

Approvals for share deals in Switzerland

30 January 2019 | Contributed by [Meyerlustenberger Lachenal](#)

Introduction

General rules

Foreign investments

Lex Koller

Banking Act

Comment

Introduction

Sale and purchase transactions with respect to privately held companies in Switzerland are usually structured as share or asset deals and, in certain cases, bulk transfers or mergers. In a share deal, the seller sells and the buyer buys a majority or quite often all of the outstanding participation rights in a target based on a sale and purchase agreement. A share deal is an indirect form of purchasing an enterprise, since the buyer acquires the assets of the company only indirectly through the acquisition of the shell holding such assets. Its influence and decision-making power does not result from the ownership of the assets held by the target, but rather from the ownership in the shares of the target, which in turn allows the buyer to appoint and replace the company's directors (and indirectly its officers and managers).

This article provides an overview of the approvals and authorisations that might be required with respect to a share deal in Switzerland. In particular, it focuses on the laws regulating foreign investments in Switzerland and summarises their key characteristics.

General rules

In general, the sale of a company via a share deal has no effect on the target's assets, liabilities, contracts, employees or governmental authorisations. As the entire entity is transferred, individual assets, liabilities and contracts need not be transferred separately and their formal owner remains the same. The employees remain employed with the target and in most cases neither the target nor the employees can derive any rights from the share deal. Exceptions may apply where employee share or option participation plans are concerned, since such plans frequently provide for acceleration mechanisms in case of a change of control – in particular, transfers involving listed companies, start-ups or companies with private equity investors.

In case of contractual change-of-control provisions – which are frequently seen in licence, supply, collaboration and financing agreements – the transaction may trigger certain rights of the target's contractual counterparty, most often:

- the right to terminate the contract;
- the lapse of certain restrictions (eg, exclusivity); and
- the right to renegotiate certain terms and conditions.

In finance or similar agreements, the contractual terms and regulatory framework often require the target's relevant key-value coding documentation to be updated.

While governmental authorisations, permits and licences relating to a target's business usually remain in place and unaffected by a transaction, a change of control may trigger duties to comply

AUTHORS

[Alexander Vogel](#)



[Camillo Devecchi](#)



with certain requirements of regulated industries – in particular, approval rights by the supervisory authorities. Such approval requirements must be considered in connection with foreign investments in Swiss companies.

Foreign investments

There is no general law in Switzerland governing a specific screening of foreign investments. In general, the same laws apply to foreign and non-foreign investments in Switzerland – in particular, the Code of Obligations and the Cartel Act. However, some laws contain specific rules with respect to foreign investments, including:

- the Federal Act on Acquisition of Real Estate by Persons Abroad (*Lex Koller*);
- the Federal Banking Act;
- the Federal Nuclear Energy Act;
- the Federal Aviation Act;
- the Federal Act on Radio and Television; and
- the Federal Act on Telecommunication.

The laws with the broadest practical relevance are the *Lex Koller* and the Federal Banking Act, which are summarised below.

Lex Koller

The *Lex Koller* impedes the purchase of Swiss real estate by foreign individuals and controlled foreign companies. It affects both direct investments in real estate and the acquisition of shares in real estate companies. Therefore, any individual or legal entity wishing to buy property in Switzerland must seek permission from the relevant cantonal authorities.

The term 'acquisition' under the *Lex Koller* is defined broadly and includes not only a direct acquisition by an individual, but also a purchase via an acquisition of:

- shares of a legal entity primarily holding real estate or holding real estate not used for commercial purposes;
- mortgage financings granted by foreign investors; and
- property such as investment arrangements.

Further, the cantons and tourist municipalities can implement their own restrictions, including by:

- banning authorisations for specific locations;
- permitting acquisitions of condominiums only; and
- up to a certain quota, limit the annual number of authorisations or permit purchases of foreign-owned residences only.

On the other hand, the *Lex Koller* also provides for exceptions. For example, no approval is required if the property in question is used exclusively for commercial purposes, whether rented out or used by the target for its own operational activities. However, the mere building, sale or rental of residential property does not qualify as 'economic activity' under the *Lex Koller*.

Further exemptions from the *Lex Koller* are available for EU and European Free Trade Association (EFTA) citizens that reside in Switzerland and hold:

- a permanent residence permit (C Permit);
- a long-term residence permit (B Permit); or
- a short-term residence permit (L Permit).

Exemptions are also available for non-EU and non-EFTA citizens with a C Permit.

Banking Act

In Switzerland, banking activities can be conducted only if the Swiss Financial Market Supervisory

Authority (FINMA) has, in accordance with the Federal Banking Act, granted the relevant company a licence. According to the Banking Act, Swiss-controlled banks require an additional licence when a controlling stake in the bank is transferred to a foreign or foreign-controlled acquirer. Further, Swiss banks and securities dealers are considered 'foreign controlled' when a foreigner directly or indirectly holds participations of more than 50% of the voting rights or otherwise exerts a controlling influence.

According to the Banking Act, the term 'foreigner' includes:

- individuals who are not a Swiss citizen and do not have a C Permit;
- legal entities or partnership with registered offices outside Switzerland; and
- legal entities or partnership with registered offices in Switzerland that are directly or indirectly controlled by foreigners (as defined above).

FINMA grants licences only if the following additional prerequisites are fulfilled:

- The country in which the owner of a qualified participation is domiciled or has its registered office must guarantee a reciprocal right; however, this requirement does not apply to countries that are members of the World Trade Organisation.
- If the transfer to foreign control causes the bank to become part of a financial group or a financial conglomerate, the foreign supervisory authority may need to consent and be able to ensure consolidated supervision of the group as a whole.
- The name of a foreign-controlled Swiss bank must not indicate that the bank is controlled by Swiss individuals or entities.

When foreign holders of qualified participations in a foreign-controlled institution change, the institution must apply to FINMA for an additional licence. This legal obligation applies to both Swiss and foreign banks and securities dealers.

The licensing and organisational requirements for financial institutions in Switzerland will be amended after the Federal Act on Financial Institutions enters into force on 1 January 2020.

Comment

In most share transactions, the target's governmental authorisations, permits and licences remain unaffected; however, the change of control may trigger specific approval requirements, particularly in transactions involving foreign investments in regulated industries. Notwithstanding certain barriers and regulations – especially in the real estate and banking sectors – Switzerland remains a comparatively liberal and attractive market for foreign investment.

For further information on this topic please contact [Alexander Vogel](#) or [Camillo Devecchi](#) at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91) or email (alexander.vogel@mll-legal.com or camillo.devecchi@mll-legal.com). The Meyerlustenberger Lachenal website can be accessed at www.mll-legal.com.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).